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[SEE SIGNATURE BLOCK FOR DEFENDANTS' COUNSEL]

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MEDSQUIRE, LLC) Case No. CV11-4504-JHN (PLAx)

Plaintiff,

VS.

SPRING MEDICAL SYSTEMS, INC.;)
QUEST DIAGNOSTICS, INC.;)
NEXTGEN HEALTHCARE)
INFORMATION SYSTEMS, INC.;)
HENRY SCHEIN MEDICAL SYSTEMS,)
INC.; HEWLETT-PACKARD)
COMPANY; APRIMA MEDICAL)
SOFTWARE, INC.;)
eCLINICALWORKS, LLC; MED3000,)
INC.; PULSE SYSTEMS, INC.;)
COMPULINK BUSINESS SYSTEMS,)
INC.; NEXTECH SYSTEMS, INC.;)
NAVINET, INC.; successEHS, INC.;)
athenaHEALTH, INC.)

Defendants.

eCLINICALWORKS, LLC;

Counterclaimant,

vs.

MEDSQUIRE, LLC;

Counterdefendant.

1 In accordance with this Court's Order for Rule 26 Joint Scheduling Report,
 2 Plaintiff Medsquire, LLC ("Medsquire") and Defendants Spring Medical Systems,
 3 Inc. ("Spring Medical"); Quest Diagnostics Incorporated (erroneously sued as Quest
 4 Diagnostics, Inc.) ("Quest"); NextGen Healthcare Information Systems, Inc.
 5 ("NextGen"); Henry Schein Medical Systems, Inc. ("Henry Schein"); Hewlett-
 6 Packard Company ("HP"); eClinicalWorks, LLC ("eClinicalWorks"); MED3000, Inc.
 7 ("MED3000"); Pulse Systems, Inc. ("Pulse"); Compulink Business Systems, Inc.
 8 ("Compulink"); Navinet, Inc. ("Navinet"); SuccessEHS, Inc. ("SuccessEHS"); and
 9 AthenaHealth, Inc. ("AthenaHealth") (collectively, "Defendants") respectfully submit
 10 the following Joint Rule 26(f) Report.

11 **A. Statement of the Case**

12 **1. Plaintiff's Statement of the Claims**

13 This is a patent infringement action. Plaintiff Medsquire, a company located in
 14 Pasadena, California, owns by assignment all rights, title and interest to U.S. Patent
 15 No. 5,682,526 (the '526 Patent) entitled Method and System for Flexibly Organizing,
 16 Recording, and Displaying Medical Patent Care Information using Fields in a
 17 Flowsheet. Medsquire alleges that Defendants infringe the '526 Patent by making,
 18 using, offering to sell and selling electronic health record ("EHR") software, systems,
 19 and services in the United States.

20 In July 2010, the Office of the National Coordinator (ONC) of the U.S.
 21 Department of Health and Human Services (HHS) issued a Final Rule to qualify EHR
 22 technology for the American Recovery and Reinvestment Act (ARRA). Rules
 23 governing ONC certification are published at 45 C.F.R. Part 170. Vendors who wish
 24 to claim ONC certification must have their software tested to demonstrate
 25 conformity to all certification criteria adopted at 45 CFR Part 170, SubPart C.

26 Each Defendant's EHR software has been tested and certified as ONC
 27 compliant. Medsquire contends that an EHR vendor must necessarily practice the
 28 claims in the '526 Patent to comply with the ONC certification requirements. For this

1 reason, among others, Medsquire believes that each Defendant infringes one or more
 2 claims of the '526 Patent. Medsquire is not aware of any invalidating prior art or
 3 other defenses to infringement.

4 **2. Defendants' Statements**

5 Defendant Spring Medical is Delaware Corporation, with its principal place of
 6 business at 14511 Falling Creek Dr Ste 305, Houston, TX 77014-1280. Spring
 7 Medical denies infringement of the '526 patent. In addition, in its affirmative
 8 defenses against Medsquire, Spring Medical will contend that the '526 patent is
 9 invalid and Medsquire's attempted enforcement of the '526 patent is barred by the
 10 doctrine of laches and by estoppel.

11 Defendant Quest is a Delaware corporation with a place of business at 3
 12 Giralda Farms, Madison, NJ 07940. Quest intends to seek dismissal with prejudice of
 13 Plaintiff's claims against Quest and denial of all relief requested by Plaintiff;
 14 judgment that each of the asserted claims of the '526 patent is invalid and that the
 15 accused products and services do not infringe any valid claim of the '526 patent;
 16 judgment that Plaintiff's claims are barred, in whole or in part, by the affirmative
 17 defenses raised by Quest; Medsquire's attempted enforcement of the '526 patent is
 18 barred by the doctrine of laches and by estoppel; judgment that Quest is the prevailing
 19 party and is entitled to recover costs; and judgment that the case is "exceptional"
 20 within the meaning of 35 U.S.C. § 285, entitling Quest to its reasonable attorneys'
 21 fees.

22 Defendant NextGen is a California corporation with a place of business at 795
 23 Horsham Road, Horsham, Pennsylvania 19044. NextGen denies infringement of the
 24 '526 patent. In addition, NextGen anticipates it will counterclaim that the '526 patent
 25 is invalid and not infringed by NextGen, and anticipates that it will provide
 26 affirmative defenses , including that the '526 patent is not infringed by NextGen, that
 27 the '526 patent is invalid, that relief to Medsquire is barred by the doctrines of waiver,
 28 equitable estoppel, laches and /or acquiescence, that Medsquire's claims are barred by

1 the doctrine of prosecution history estoppel, that any damages that may be awarded
 2 are limited by failure to mark and the doctrines of full compensation, exhaustion, first
 3 sale, and/or implied license, that relief may be barred or limited under 35 U.S.C.
 4 §§ 273 and 286, that NextGern has not willfully infringed, the Plaintiff is not entitled
 5 to an exceptional case, and that Medsquire has failed to state a claim upon which
 6 relief can be granted.

7 Defendant Henry Schein is an Ohio corporation with a place of business at 760
 8 Boardman Canfield Rd, Youngstown, OH 44512-4344 Henry Schein denies
 9 infringement of the '526 patent. Henry Schein also contends that claims of the '526
 10 patent are limited by the text of the patent, the prosecution history, and/or the prior art
 11 so that Plaintiff is estopped, or otherwise precluded, from even asserting that any
 12 claim is infringed by Henry Schein literally or by equivalents. In addition to any and
 13 all affirmative defenses that Henry Schein will assert against Medsquire, Henry
 14 Schein will contend that the '526 patent is invalid and/or unenforceable and that
 15 Medsquire's attempted enforcement of the '526 patent is barred by the doctrine of
 16 waiver, laches, estoppel and/or unclean hands. In addition, Henry Schein contends
 17 that Complaint fails to state a claim and/or that Plaintiff lacks standing to assert its
 18 claim.

19 Defendant HP is a Delaware corporation with a place of business at 3000
 20 Hanover St, Palo Alto, CA 94304-1112. HP denies infringement of the '526 patent as
 21 it does not believe that it offers for sale (or directs others to use) any software relating
 22 to the asserted patent.. In addition, HP anticipates that in the event Plaintiff's
 23 Complaint or Amended Complaint, if required, is found to state a claim for
 24 infringement of the '526 patent by HP, it will respond to that Complaint setting forth
 25 certain defenses and affirmative defenses, and that it will file a counterclaim alleging,
 26 *inter alia*, that it does not infringe the '526 patent and that the patent is invalid.

27 Defendant Quest is a Delaware corporation with a place of business at 3
 28 Giralta Farms, Madison, NJ 07940. Quest denies infringement of the '526 patent. In

1 addition, in its affirmative defenses against Medsquire, Quest will contend that the
2 '526 patent is invalid and Medsquire's attempted enforcement of the '526 patent is
3 barred by the doctrine of laches and by estoppel.

4 Defendant eClinicalWorks is a Massachusetts limited liability company with a
5 place of business at 110 Turnpike Rd, Westborough, MA 01581-2864.
6 eClinicalWorks denies infringement of the '526 patent and has asserted numerous
7 affirmative defenses such as estoppel, laches, waiver, and failure to comply various
8 requirements of the Patent Act (35 U.S.C. § 100, *et seq.*) that, if proven, will
9 invalidate the '526 patent, render it unenforceable against eClinicalWorks, and/or
10 severely limit any potentially available damages. In addition, eClinicalWorks has
11 asserted a Counterclaim seeking a declaratory judgment that the '526 patent is invalid
12 and is unenforceable against and not infringed by eClinicalWorks.

13 Defendant MED3000 is a Delaware corporation with a place of business at 680
14 Andersen Drive Foster Plaza 10, Pittsburgh, PA 15220. MED3000 denies
15 infringement of the '526 patent. In addition, MED3000 anticipates it will
16 counterclaim that the '526 patent is invalid and not infringed by MED3000, and
17 anticipates that it will provide affirmative defenses against Medsquire, including that
18 the '526 patent is invalid and Medsquire's attempted enforcement of the '526 patent is
19 barred by the doctrine of laches and by estoppel.

20 Defendant Pulse is a Kansas corporation with a place of business at 3017 North
21 Cypress Drive, Wichita, KS 67226. Pulse denies infringement of the '526 patent.
22 Pulse will assert affirmative defenses against Medsquire that the '526 patent is invalid
23 and not infringed, and further that Medsquire's attempted enforcement of the '526
24 patent is barred by the doctrine of laches and by estoppel. In addition, Pulse will
25 counterclaim that the '526 patent is invalid and not infringed by Pulse.

26 Defendant Compulink is a California corporation with a place of business at
27 2645 Townsgate Rd Ste 200, Westlake Village, CA 91361-2722. Compulink denies
28 infringement of the '526 patent. In addition, in its affirmative defenses against

1 Medsquire, Compulink will contend that the '526 patent is invalid and Medsquire's
2 attempted enforcement of the '526 patent is barred by the doctrine of laches and by
3 estoppel.

4 Defendant Navinet is a Delaware corporation with a place of business at 179
5 Lincoln Street, Boston, MA 02111. Navinet denies infringement of the '526 patent.
6 In addition, in its affirmative defenses against Medsquire, Navinet will contend that
7 the '526 patent is invalid and Medsquire's attempted enforcement of the '526 patent is
8 barred by the doctrine of laches and by estoppel.

9 Defendant SuccessEHS, Inc. is an Alabama corporation with its principal place
10 of business at 1 Metroplex Dr Ste 500, Birmingham, AL 35209-7801. SuccessEHS,
11 Inc. denies infringement of each and every claim in the '526 patent. In addition, as its
12 affirmative defenses against Medsquire, SuccessEHS, Inc. may assert in the future the
13 following defenses and reserves the right to raise additional other defenses as
14 permitted: (1) the '526 patent is invalid, (2) SuccessEHS, Inc. does not infringe upon
15 any one or more of the claims in the '526 patent, (3) Medsquire's attempted
16 enforcement of the '526 patent is barred by the doctrines of laches, waiver, estoppel,
17 acquiescence, prosecution history estoppel, and inequitable conduct, and that any
18 damages that may be awarded are limited by failure to mark and the doctrines of full
19 compensation, exhaustion, first sale, and/or implied license, that relief may be barred
20 or limited under 35 U.S.C. §§ 273 and 286, that SuccessEHS has not willfully
21 infringed, that Plaintiff is not entitled to an exceptional case, and that Medsquire has
22 failed to state a claim upon which relief can be granted.

23 Defendant athenaHEALTH is a Delaware corporation with a place of business
24 at 311 Arsenal St, Watertown, MA 02472-2782. athenaHEALTH denies
25 infringement of the '526 patent. In addition, in its affirmative defenses against
26 Medsquire, athenaHEALTH will contend that the '526 patent is invalid and
27 Medsquire's attempted enforcement of the '526 patent is barred by the doctrine of
28 laches and by estoppel.

1 **B. Subject Matter Jurisdiction**

2 This Court has subject matter jurisdiction of Medsquire's patent infringement
 3 claims pursuant to 28 U.S.C. §§ 1331 and 1338(a).

4 **C. Legal Issues**

5 The key legal issues expected in this case are claim construction, infringement,
 6 validity, unenforceability, laches and estoppel, inequitable conduct and evidentiary
 7 issues regarding damages. No parties have conducted discovery to date and may have
 8 additional issues for purposes of discovery.

9 **D. Parties, Evidence, Etc.**

10 The parties are Medsquire, Spring Medical, Quest, NextGen, Henry Schein HP,
 11 eClinicalWorks, MED3000, Pulse, Compulink, Navinet, SuccessEHS, and
 12 AthenaHealth. At this time, the parties anticipate that percipient witnesses will
 13 include the inventors of the '526 patent (Timothy L. Smokoff, Tom Marlin, and
 14 Herbert J. Uhring), attorneys and law firms who prosecuted the '526 patent
 15 application that ripened into the '526 patent, and persons knowledgeable regarding:

- 16 1. the Defendants' EHR software, systems, and services;
- 17 2. the sales of Defendants' EHR software, systems, and services;
- 18 3. license and other agreements relating to the '526 patent;
- 19 4. prior art to the '526 patent;
- 20 5. inventorship;
- 21 6. the original assignee of the '526 patent, Spacelabs Medical;
- 22 7. the ONC certification alleged by Plaintiff;
- 23 8. the royalty sought by Plaintiff; and
- 24 9. Plaintiff and its predecessors' knowledge of the Defendants' use and sale
 25 of their respective products.

26 Witnesses also may include individuals who developed various electronic
 27 medical records systems prior to the date of Medsquire's claimed invention date
 28 and/or the priority date of the '526 patent.

1 **E. Damages**

2 Medsquire will seek as damages a reasonable royalty for all infringing
 3 activities. The royalty will be based on the sales of infringing EHR software,
 4 systems, and services. At this time, Medsquire does not know the amount of
 5 infringing sales. Additionally, Medsquire may seek an injunction barring the
 6 continued sales of infringing software and systems.

7 HP submits that, under the applicable damage law, Medsquire's royalty cannot
 8 properly be based on sales on the entire EHR software, systems, and services.

9 Defendants contend that, because Medsquire does not manufacture or sell its
 10 own EHR product, it is not entitled to any injunctive relief.

11 **F. Insurance**

12 No Defendant is aware of insurance coverage for the claims at issue.

13 **G. Motions**

14 Medsquare does not plan to add other parties or file amended pleading.
 15 Medsquire currently is investigating other potential infringers. As to other infringers,
 16 Medsquire intends to file separate actions with appropriate notices of related case.
 17 Medsquire will oppose the motions by Defendants described below.

18 SuccessEHS, Inc. intends to move to dismiss Medsquire's claims for direct and
 19 indirect infringement based on failure to state a claim under Rule 12(b)(6).

20 Quest filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) on Monday,
 21 July 18, 2011. Quest may file a motion to sever and/or dismiss for misjoinder under
 22 Fed. R. Civ. P. 20 and 21. Quest also anticipates that it may file motions seeking
 23 summary judgment on one or more aspects of the claims, counterclaims and defenses
 24 in the litigation. Quest also expects to file pre-trial motions, such as motions in
 25 limine, and may file discovery motions if the need arises.

26 HP has joined Quest's Motion to Dismiss Medsquire's Complaint pursuant to
 27 Fed. R. Civ. P. 12(b)(6).

28 NextGen does not plan to move to transfer venue or to dismiss on jurisdictional

1 grounds. NextGen intends to move to dismiss Medsquire's claims for direct and
 2 indirect infringement based on failure to state a claim under Rule 12(b)(6).

3 On July 18, 2011, MED3000 (and other Defendants) moved to dismiss
 4 Medsquire's claims for direct and indirect infringement based on failure to state a
 5 claim under Rule 12(b)(6).

6 Pulse intends to move to dismiss Medsquire's claims for direct and indirect
 7 infringement based on failure to state a claim under Rule 12(b)(6).

8 Henry Schein reserves its right to file a motion to sever in addition to
 9 dispositive motions.

10 **H. Manual for Complex Litigation**

11 The parties presently do not believe that the procedures and techniques set forth
 12 in the Manual for Complex Litigation are required in this action. If unforeseen events
 13 result in additional complexity in this case, the parties will confer and may
 14 recommend and/or move to request that some or all of the procedures and techniques
 15 set forth in the Manual for Complex Litigation or other case management procedures
 16 or techniques be implemented.

17 **I. Status of Discovery**

18 At this time, no discovery has been completed. The parties expect that
 19 discovery will include document requests, interrogatories, requests for admission, and
 20 depositions. Additionally, the parties may seek some third party discovery.

21 **J. Discovery Plan**

22 The parties agree that discovery will be needed on issues of infringement,
 23 validity, and damages and any other defenses asserted by Defendants. The parties do
 24 not suggest conducting discovery in phases or to otherwise limit discovery. Aside
 25 from these agreed points, the parties' separate proposals are set forth below:

26 ***Plaintiff's Proposal:***

27 Plaintiff believes that the discovery procedures and limits contained in the
 28 Federal Rules of Civil Procedure should be followed. Plaintiff does not oppose the

1 exchange of infringement and invalidity contentions as Defendants have proposed
2 below. Plaintiffs proposes that claim construction be addressed in the context of
3 summary judgment so that the Court will know the context and relevance of differing
4 proposed constructions. However, if the Court is inclined to hold separate claim
5 construction proceedings, Plaintiff believes that Defendants' proposed schedule, set
6 forth below, is prejudicial and will not result in meaningful exchanges and claim
7 construction proceedings. To provide meaningful exchanges and claim construction
8 proceedings, enough discovery must take place such that all parties have the
9 information needed for infringement and validity contentions, and needed to propose
10 constructions matter to the case, not merely requests for advisory options. Indeed, it
11 is entirely unreasonable to expect Plaintiff to provide infringement contentions by
12 July 25, 2011, before it conducts *any* discovery. Accordingly, Plaintiff proposes that
13 infringement contention exchanges, invalidity exchanges, and claim construction
14 proceedings take place no sooner than one month prior to the close of fact discovery.

15 ***Defendants' Proposal:***

16 Defendants propose that Rule 26(a) disclosure requirements should be altered,
17 and that disclosures should take place two weeks after the Court rules on the motion
18 to dismiss.

19 Defendants propose an initial and separate *Markman* briefing schedule, and if
20 the Court is so inclined, a *Markman* hearing to allow for narrowing of the issues
21 presented for summary judgment. Defendants propose the following schedule in
22 addition to the dates set forth in Exhibit A.:

23 Initial Disclosures to be filed	Two weeks from the date on which the 24 Court enters its Order on Defendants' Motion to Dismiss Under Rule 12(b)(6)
25 Plaintiff to serve each Defendant with infringement contentions	July 25, 2011
26 Defendants to serve invalidity contentions	September 16, 2011
27 Each party to serve list of proposed claim terms for construction	November 11, 2011

1	Each party to serve proposed claim term constructions	December 9, 2011
2	Opening Claim Construction Briefs filed and served by each party (simultaneously)	January 9, 2012
4	Responsive Claim Construction briefs filed and served by each party (simultaneously)	January 30, 2012
6	<i>Markman</i> hearing	February ___, 2012

8 **K. Discovery Cut-Off**

9 The parties' respective requests are set forth in the attached Schedule of Pretrial
10 and Trial Dates.

11 **L. Expert Discovery**

12 The parties' respective requests are set forth in the attached Schedule of Pretrial
13 and Trial Dates.

14 **M. Dispositive Motions**

15 The parties anticipate making dispositive or partially dispositive motions.

16 Plaintiff contemplates a possible summary adjudication motion on the issue of
17 infringement. Plaintiff also believes that the number of separate motions allowed by
18 Defendants should be limited to avoid piece-meal adjudication of issues that will
19 overwhelm both the Plaintiff and the Court. As noted above, Plaintiff proposes that
20 all claim construction issues be addressed as part of briefing on summary judgment
21 rather than in a separate *Markman* proceeding. This will allow the Court to consider
22 the context of any claim construction disputes.

23 Defendants contemplate filing various, separate summary judgment motions,
24 including on the issues of non-infringement, laches, willfulness (if alleged), invalidity,
25 and/or limitations of damages. The parties' respective requests are set forth in the
26 attached Schedule of Pretrial and Trial Dates. Defendants also propose an initial and
27 separate *Markman* briefing schedule and hearing to allow for the narrowing of the
28 issues presented for summary judgment. Dates are proposed as part of the attached

1 Schedule.

2 **N. Settlement**

3 Medsquire has had some settlement discussions with some Defendants on an
4 individual basis, but not all Defendants.

5 The parties agree to participate in a non-judicial dispute resolution proceeding
6 in accordance with Local Rule 16-14.4.

7 **O. Trial Estimate**

8 The parties estimate between 5 and 20 court days for a jury trial depending on
9 whether the Court tries all Defendants together or in groups. Medsquire will be
10 prepared to try the case against all Defendants in a single trial. Depending on the
11 issues in the case at the time of trial, especially as they relate to individual defenses
12 and claims, the Defendants reserve the right to request separate trials.

13 Defendant SuccessEHS, Inc. believes trying all Defendants together will be
14 inefficient, unnecessarily costly, and confusing for the jury. Defendant SuccessEHS,
15 Inc. requests that the Defendants be separated for trial.

16 Subject to a potential motion to sever and depending on the number of the
17 Defendants and issues in the case at the time of trial, Quest reserves the right to
18 request a separate trial.

19 **P. Trial Counsel**

20 Trial counsel for Medsquire is Lawrence Hadley of Hennigan Dorman LLP in
21 Los Angeles, California.

22 Trial counsel for Spring Medical Systems, Inc. is Jack B. Smyth, President and
23 Chief Executive Officer in Houston, Texas.

24 Trial counsel for Quest Diagnostics is D. James Pak of Baker & McKenzie LLP
25 in San Diego, California.

26 Trial counsel for NextGen Healthcare Systems, Inc. is Jeffrey M. Goldman and
27 Noah Malgeri of Pepper Hamilton LLP in Irvine, California.

28 Trial counsel for Henry Schein Medical Systems, Inc. is Nancy Sher Cohen, of

1 Proskauer Rose LLP in Los Angeles, California and Bruce Fader, Baldassare Vinti
2 and Colin Cabral of Proskauer Rose LLP in New York, New York.

3 Trial counsel for Hewlett-Packard Company is David A. Segal and Jeffrey T.
4 Thomas of Gibson, Dunn & Crutcher LLP in Irvine, California.

5 Trial counsel for eClinicalWorks, LLC is John W. Amberg, Keith Aurzada,
6 Ryan Pumpian and Shelly C. Gopaul of Bryan Cave LLP in Santa Monica,
7 California.

8 Trial counsel for MED3000, Inc. is Scott D. Baker of Reed Smith LLP in San
9 Francisco, California and Kirsten R. Rydstrom and Kevin S. Katona of Reed Smith
10 LLP in Pittsburgh, Pennsylvania.

11 Trial counsel for Pulse Systems, Inc. is Don V. Kelly of Evans & Dixon LLC in
12 St. Louis, Missouri.

13 Trial counsel for Compulink Business Systems, Inc. is Michael Harris of SoCal
14 IP Law Group LLP in Westlake Village, California.

15 Trial counsel for Navinet, Inc. is John M. Adams of Price & Adams, P.C. of
16 Pittsburgh, Pennsylvania.

17 Trial counsel for SuccessEHS is Karin G. Pagnanelli of Mitchell Silberberg &
18 Knupp LLP in Los Angeles, California.

19 Trial counsel for athenaHEALTH, Inc. is Michael A. Albert and Hunter D.
20 Keeton of Wolf, Greenfield & Sacks, P.C. in Boston, Massachusetts.

21 **Q. Independent Expert or Master**

22 At this time, the parties do not believe that this case will require the use of an
23 independent expert or master.

24 **R. Timetable**

25 The parties' respective requests are set forth in the attached Schedule of Pretrial
26 and Trial Dates.

27 **S. Other Issues**

28 Medsquire will require the production of source code for the accused EHR

1 software systems. Accordingly, the parties expect that a protective order covering the
2 exchange of confidential information will be required and that the protective order
3 will need special provisions concerning the protection of source code.

4
5 DATED: July 19, 2011

HENNIGAN DORMAN LLP

6
7 By /s/Lawrence M. Hadley
8 Lawrence M. Hadley
9 Attorneys for Plaintiff MEDSQUIRE LLC

10
11 DATED: July 19, 2011

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